expressed by its pronouncement that spectrum auctions "should place licenses in the hands of the parties able to use them most efficiently." Competitive Bidding Order, quoted in Further Notice at ¶ 121.

Rather than looking for ways to punish successful "big guys", who presumably have legitimate reasons to spend large sums of money to acquire radio spectrum, this agency ought to spend more time ensuring that smaller players also have a fair opportunity to obtain some useable portion of the radio spectrum. A more deliberate and restrained use of the FCC's auctioning power would certainly be one way to level the playing field between large and small communications businesses. Spectrum caps, on the other hand, do nothing to promote small businesses.

VIII. Licensing Rules & Procedures.

The Further Notice requests comments on how CMRS operators will be licensed in the near future. The Commission points out that many Part 90 licensees will soon be subject to statutory protest periods, petitions to deny, and mutually exclusive filings. For "grandfathered" Part 90 licensees (those licensed prior to August 10, 1993), and private carriers, these requirements will not be effective for three years, until August 10, 1996. (It remains to be seen how the FCC will define certain "grandfathered licensees." Since private radio systems may consist of multiple station licenses and call signs, it would be unfair for the Commission to classify a Part 90 operator as "new"

on the basis of just one Part 90 license.). "New" Part 90 licensees, on the other hand, will be subject to the new CMRS rules upon their adoption.

A. Application Forms.

The FCC has drafted a new "Form 600" to cover all CMRS services; it is attached to its Further Notice. That form is two pages long, with six different schedules to be used depending on the CMRS service at issue.

It is obvious that the FCC has attempted to come up with a unified, simple form for all Part 90 and Part 22 services, and those efforts should be praised. Nevertheless, it will take some time to become familiar with this new form, so it is difficult to say whether it is an improvement over previous ones. Surely, the one-page FCC Form 574 had simplicity in its favor; one would have hoped that the Commission could have devised a similar simple form for all CMRS applications.

The new form seems to unnecessarily require explicit responses concerning various eligibility matters. Since all radio applicants are expected to be familiar with the Act and the FCC's Rules, and to certify in an application that they qualify for a license under those Rules, it was not essential for the new CMRS application to reiterate all of those requirements.

Also, the fact that the FCC will continue to require microfiche copies from certain CMRS applicants, a technology that predates the invention of television, to license the builders of the "Information Superhighway," should be cause for serious

agency and industry concern. What with enormous spectrum auction fees, annual user fees, and higher application fees, it will soon become difficult to convince the mobile radio industry that the FCC still cannot afford to obtain the most rudimentary computer equipment needed to efficiently handle the licensing needs of CMRS applicants.

B. **Application Fees/Regulatory Fees**.

It is understandable that the FCC would want to ensure that comparable filing fees, and annual regulatory fees, are imposed on Part 90 and Part 22 applicants under the new CMRS Rules. One option, of course, would have been to lower the Part 22 filing fee from $230 to the Part 90 level of $35, and to lower the Part 22 annual regulatory fee from $60 per 1000 subscribers to the Part 90 level of $16 per license per year. Oddly enough, that proposal was never raised in the Further Notice, rather, the FCC proposed the alternative: to raise everyone's filing and regulatory fees to the Part 22 level. Surely, this is the least surprising proposal in the Further Notice.

It would be easy to cynically shrug off this fee increase as inevitable, but it is far from inevitable that higher filing and regulatory fees for Part 90 operators would be deemed consistent with Congress's statutory mandate, and the FCC's obligations. At present, Part 90 licensees obtain their radio licenses quicker, with less expense, and less paperwork than do Part 22 licenses. Now, the FCC is proposing to charge them more, for slower, more expensive application processing, without any explanation. That

is unacceptable.

The Further Notice states that the FCC will assess whether "competition ... might be harmed ..." by proposed CMRS changes, and whether they will cause "practical considerations and difficulties ... associated with the changes." Further Notice at ¶ 23. A nearly ten-fold increase in filing expenses for Part 90 applicants certainly constitutes a "practical consideration and difficulty." Yet, this agency has not even attempted to explain why Part 22 filing fees should be so much higher than the ones that presently apply to "substantially similar" PCP services. (The public protest requirements of Section 309 cannot be blamed for those differences; informal protests can also be filed against Part 90 applications).

This fee increase should be addressed, and the agency should publicly account for the differences in speed of processing, and costs, between the "substantially similar" Part 90 and Part 22 CMRS services, before higher fees are imposed on Part 90 carriers.

C. **Public Notice/Petition to Deny Procedures**.

The FCC has determined that Section 309 Public Notice requirements will not apply to PCP services until such time as the FCC resolves pending PCP exclusivity matters. Further Notice at ¶ 128. Other Part 90 services may be subject to the 30 day protest and mutually exclusive filing rules that govern common carrier applications. The FCC has proposed shortening the "MX" period from 60 to 30 days. Rather than using lotteries to select

between mutually exclusive applicants, the Commission has proposed that auctions be used in the CMRS services. Id. at ¶ 119-128.

The FCC seems wedded to the conclusion that placing Part 90 applications on public notice and allowing petitions to deny "is likely to lengthen the licensing process for these applicants in comparison to existing private radio procedures." Further Notice at ¶ 118. It is not inevitable that Section 309's requirements should cause a delay in the ability of Part 90 or Part 22 licensees to commence operations. Network USA offers the following suggestions to expedite the processing of all CMRS applications.

The FCC could readily dismiss many frivolous petitions to deny simply be enforcing the statutory requirement that a petitioner have "standing" to protest an application. Section 309(d)(1) of the Act confers standing to file a petition to deny only on a "party in interest," and "[t]he petition shall contain specific allegations of fact sufficient to show that petitioner is a party in interest[.]" 47 U.S.C. § 309(d)(1).

The allegations of fact necessary to prove standing must be supported by affidavit. Corpus Christi Cellular Telephone Co., 3 FCC Rcd. 1889, 1889 (Mob. Serv. Div., 1988); Lawrence N. Brandt, 3 FCC Rcd. 4082, 4082 (Dom. Fac. Div., 1988). Moreover, the Petitioner must demonstrate that it will suffer direct injury from grant of the Application. See, e.g., Lawrence N. Brandt, 3 FCC Rcd. at 4082. In short, a rigorous review of a protestor's

standing, the moment a protest is filed, could lead to the dismissal of many frivolous or "greenmail" protests.

Moreover, nothing in the language of Section 309 of the Act prohibits the FCC from allowing "conditional" operation of a radio station prior to expiration of the protest period, subject to termination or deferral if a "valid" petition to deny is later filed, in a timely manner. An applicant could elect to construct and operate a CMRS station under the express condition that it shut down operations if a petition to deny is filed within 30 days of public notice of the application. If a valid protest is filed, the applicant could either request Special Temporary Authorization to continue operations (grantable at the FCC's discretion, under Section 309 of the Act), or elect to shut down until the protest is resolved.

D. **Amendments and Modifications**.

The FCC has preliminarily determined that modification applications are not appropriate for competitive bidding in mutually exclusive situations. Network USA agrees. Likewise, major amendments should not be subject to competitive bidding. Presumably, the underlying application has already been "available" for competitive bids. Applicants should be able to make necessary changes to their applications without having to risk an auction.

E. **Permissible Changes/Minor Modifications**.

The FCC has asked for suggestions as to what facilities changes could be deemed "minor" or "permissive" under the new

CMRS Rules. Further Notice at ¶ 134. In addition to those listed therein, Network USA suggests that the Commission consider allowing licensees to relocate control stations as a minor or permissive change, so long as it can be accomplished without causing harmful interference to other stations. Under the current rules, virtually any relocation of a control station is considered a major modification. That rule can cause unnecessary and costly delays, particularly when associated base stations are ready to be moved under the minor modification rules.

F. License Terms/Renewal Expectancy.

Network USA agrees that Part 90 licenses should be conformed to be 10 years long, such as Part 22 licenses. Network USA concurs with the proposal to adopt a "renewal expectancy" for incumbent CMRS licensees.

G. Assignment of Licenses/Transfers of Control.

The FCC proposes that only constructed and operational exclusive frequency CMRS stations may be assigned or transferred, "provided that the applicant can demonstrate that the assignment or transfer will serve the public interest ...." Further Notice at ¶ 144. It is not clear what "demonstration" would pass agency muster under the public interest standard, and that vagueness is reason enough for concern with this proposal.

The "constructed station" requirement itself is not unreasonable, however, the FCC should allow exceptions when there are unusual showings of need.

The FCC has stated that these requirements will not apply to

shared frequency CMRS stations, since "trafficking" is not a practical concern on a shared frequency. Network USA concurs.

VII. Conclusion

The FCC may not now fully appreciate how "surprised" many licensees will be when they learn about the new CMRS rules that will govern their businesses. That concern merits a cautious, deliberate, and clearly defined approach toward the adoption of these new CMRS rules. Unfortunately, Congress has left the FCC with little time for such a contemplative approach.

One would hope that the Further Notice itself could be interpreted as good faith compliance with the August 1994 statutory deadline, and that the FCC could take some time to read the industry's comments, consider their concerns and practical needs, and ensure that the quality of the new CMRS rules does not suffer in the haste to adopt them.

Respectfully submitted,

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